# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 747

SHERIDAN CREATIONS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-8b) is reported at 357 F. 2d 245. The decision and order of the Board (R. 2-11)[1] are reported at 148 NLRB 1503.

### JURISDICTION

The decision of the court of appeals was issued on March 16, 1966, and a decree was entered on June

[1] "R." refers to the joint appendix to the parties' briefs in the court below, a copy of which was filed with the petition.

8, 1966 (Pet. App. 9b-10b). On September 9, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including November 5, 1966. The petition was filed on November 4, 1966. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board properly held that the employer violated his duty to bargain collectively under the National Labor Relations Act by attempting to withdraw from a multiemployer bargaining unit after negotiations for a new contract had commenced.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 1a-4a of the Appendix to the petition.

## STATEMENT

In 1959, District 65, Retail, Wholesale and Department Store Union, AFL-CIO, after organizing the employees of petitioner, a wholesaler of ladies' sweaters, entered into an agreement with petitioner whereby the latter accepted the existing multiemployer contract between the Union and Knitwear Employers Association, Inc., and agreed to bargain through the Association when that contract expired (R. 3, 17, 34-35, 157). In 1960, petitioner became

a member of the Association, engaged in collective bargaining on a multiemployer basis in 1960 and 1961, and thereby became bound by the agreements negotiated by the Association. These agreements, *inter alia*, recognized the Union as the exclusive representative of the Association members' employees (R. 3, 15-20; 33-35, 90-93, 116-117, 129-156, 162).

The 1961 agreement between the Union and the Association had a termination date of April 30, 1963. On February 23,[2] the Union, in accordance with past practice and with the terms of the existing contract, notified the Association and each member, including petitioner, that it desired to make certain changes in the agreement. The Union requested a date for negotiations. Petitioner received, but did not reply to, the Union's letter (R. 18; 97, 159). The Association arranged to meet with the Union on March 14, and mailed a notification of the forthcoming meetings to its members (R. 18; 41, 97, 113). Petitioner received such notification, but did not reply (R. 97).

The Association and the Union met on March 14 and 25, at which times the Union presented and explained its new contract demands (R. 18; 41-42, 64-65). In addition to the spokesmen for the Association and the Union and their respective negotiating committees, 30 or 40 members of the Association and their employees were present as observers in the negotiating room (R. 18; 41, 48-51).

On March 27, while the multiemployer bargaining was still in process, petitioner filed a representation

[2] Dates hereafter refer to 1963, unless otherwise indicated.

petition with the Board requesting an election in a single unit of only petitioner's employees,[3] which it withdrew two weeks later. On April 1, four days after filing the election petition, petitioner notified the Association that, as of March 26, it was withdrawing all bargaining authority from the Association (R. 19; 143). Petitioner did not send a copy of this deauthorization letter to the Union, but on April 3, the Association mailed it one (R. 19; 64).

On April 30, the Association and the Union reached agreement on a new 2-year contract, which was ratified by the employees that evening and became effective the next day (R. 19-20; 41-43, 160). Petitioner refused to sign the new agreement, and, after the old agreement expired on April 30, it refused to continue recognizing the Union as the representative of its employees (R. 21; 131).

Upon charges filed by the Union, the Board found that petitioner had failed to give timely and unequivocal notice of its desire to withdraw from the multiemployer unit. Accordingly, the Board held that it had refused to bargain, in violation of Section 8(a)(5) and (1) of the Act, by refusing to accept the new contract negotiated between the Association and the Union and by refusing to continue

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[3] Petitioner's secretary-treasurer testified that, in the latter part of 1962, he had received an inquiry from employees about leaving the Union, and had spoken with the Association spokesman, who indicated petitioner was bound until expiration of the current agreement on April 30, 1963. He further testified that the election petition of March 27 was filed following another inquiry from employees concerning withdrawal from the Union (R. 4, 20-21; 96-97, 112-113).

to recognize and to bargain with the Union in the multiemployer unit (R. 2-8). The Board ordered petitioner to cease and desist from these refusals, and, upon request, to bargain with the Union as the exclusive representative of the employees in the multiemployer unit, and to sign the May 1963 agreement (R. 8-11). The court of appeals (with Chief Judge Lumbard dissenting) sustained the Board's findings and conclusions (Pet. App. 1b-8b), but entered a limited decree, which, in effect, permits petitioner presently to withdraw from the multiemployer unit but requires it to satisfy any past obligations which would have accrued had it complied with the 1963 agreement (Pet. App. 9b-10b).[4]

## ARGUMENT

The decision below is correct and is not in conflict with that of any other court. Moreover, in light of the limited decree entered by the court below, the decision is of little practical importance. There is no occasion for review by this Court.

Although the Act does not expressly provide for bargaining units larger than "the employer unit,"[5]

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[4] Petitioner submitted a narrow decree, omitting any requirement that it bargain with the Union in the multiemployer unit or sign the May 1963 agreement. Petitioner contended that, since the 1963 agreement had meanwhile expired, it could now appropriately withdraw from the multiemployer unit. The court, with one modification, entered the decree proposed by petitioner.

[5] Section 9(b) provides that the Board shall determine in each case whether the appropriate unit for collective bargain-

the Board, from its earliest days, has concluded that it is empowered to find, and has found, multiemployer units appropriate for bargaining purposes where the parties have mutually consented to bargain, and there has been a history of bargaining, on a multiemployer basis. See *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96.[6] However, since mutual consent is an essential predicate for the establishment of a multiemployer bargaining unit, the Board has also permitted employers and unions to withdraw from an existing multiemployer unit, where the notification of withdrawal has been communicated at a proper time and in an unequivocal manner.[7] Notification of withdrawal is timely if "given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, [the Board will] not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other * * *" (*Retail*

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ing shall be "the employer unit, craft unit, plant unit, or subdivision thereof."

[6] See also *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002, 1024-1025; *Rayonier, Incorporated*, 52 NLRB 1269, 1274-1275; *Andes Fruit Co.*, 124 NLRB 781, 783.

[7] *Publishers' Association of New York City, et al.* v. *National Labor Relations Board and New York Typographical Union No. 6*, No. 635, this Term, presents the issue whether union withdrawals from a multiemployer should be governed by the same principles which govern employer withdrawals.

*Associates Inc.*, 120 NLRB 388, 395).[8] Applying this principle here, the Board properly concluded that petitioner's attempted withdrawal from the multiemployer unit was untimely. Petitioner remained silent when it received the Union's request for negotiations for a new agreement and the Association's notification of the date on which negotiations would commence and did not notify the Association of its intention to abandon multiemployer bargaining until two weeks of negotiations for a new contract had elapsed (*supra*, pp. 3-4).

It is not material that there was no showing that petitioner was acting in bad faith or that its untimely attempt to withdraw actually disrupted the negotiations. As the majority below pointed out (Pet. App. 3b):

> A shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process. In a case such as this, good faith withdrawal of a small unit might in practice have minimal or no effect. However, the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun. * * *

Nor is it the case, as petitioner contends, that the Board's decision requires it to recognize a minority

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[8] See also *Anderson Lithograph Co., Inc.*, 124 NLRB 920, 928-929, enforced *sub nom. National Labor Relations Board* v. *Jeffries Banknote Co.*, 281 F. 2d 893 (C.A. 9); *Detroit Window Cleaners Union, Local 139*, 126 NLRB 63, 70-71.

union as the exclusive representative of its employees. Since petitioner had not properly withdrawn from the multiemployer unit, the question of the Union's representative status depends on whether it had the support of a majority of the employees in that unit. The presumption that the Union continued to enjoy such support was not rebutted by petitioner's showing that its employees, who constituted only a small segment of the unit, no longer desired the Union.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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